

DEPARTMENT OF MANAGED HEALTH CARE

INITIAL STATEMENT OF REASONS

**California Code of Regulations
Title 28, Article 7, Section 1300.67.02**

**Transfer of Enrollees Pursuant to a Public
Health Order**

(Control No. 2021-TRFR)

Pursuant to Government Code section 11346.2, the Director of the Department of Managed Health Care (Department) submits this Initial Statement of Reasons in support of the proposed adoption of California Code of Regulations, Title 28, section 1300.67.02 (hereinafter “Rule 1300.67.02”), as amended by the emergency regulatory action approved on January 15, 2021 (see OAL File Number: 2010-0112-01-E). The Department proposes to permanently adopt the emergency regulations, without change. The Department is also hereby incorporating by reference, the above-mentioned emergency regulatory filing.

I. AUTHORITY

Health and Safety Code section 1343 defines the term “health plan” and “specialized health plan” and lists those entities not subject to the jurisdiction of the Department and the Knox-Keene Act.

Health and Safety Code section 1344 grants the Director authority to adopt, amend, and rescind regulations as necessary to carry out the provisions of the Knox-Keene Act, including rules governing applications and reports, and defining any terms as are necessary to carry out the provisions of the Knox-Keene Act.

II. SPECIFIC PROBLEMS ADDRESSED AND NECESSITY OF REGULATION

The adoption of Rule 1300.67.02, which the Department now proposes to make permanent without change, is necessary to interpret, implement and make specific the requirements for health plan transfer or enrollees from the most highly impacted hospitals receiving an influx of patients with the SARS-CoV-2 virus, which causes COVID-19 (hereinafter COVID-19), to hospitals with more available capacity. This regulation is necessary and will benefit California by allowing health plans the ability to transfer patients from one facility to another facility to ensure hospitals are able to handle the influx of patients and ensure enrollees are able to receive access to medically necessary services in a timely manner. The ability of COVID to mutate and develop different strains, such as the more easily transmitted Delta variant, continues to impact the California hospital systems treating enrollees.

On January 31, 2020, the United States Department of Health and Human Services Secretary Alex A. Azar declared a public health emergency for the United States to aid the nation's healthcare community in responding to the coronavirus disease (COVID-19). The Centers for Disease Control (CDC) has declared COVID-19 a worldwide pandemic due to its global effect. On March 13, 2020, former President Donald Trump invoked the Stafford Act and declared a national emergency regarding the COVID-19 outbreak.

On March 4, 2020, Governor Gavin Newsom declared an emergency in the state of California in response to the outbreak of respiratory illness due to the novel coronavirus known as COVID-19. On March 19, 2020, Governor Newsom issued Executive Order N-33-20, a stay-at-home order to protect Californians and slow the "rapid spread" of COVID-19. Some stay-at-home directions were subsequently modified, but as of the current time, Governor Newsom announced reinstatement of some restrictions to slow the spread and address the spike in new COVID-19 cases.

As of August 31, 2021, California has 4,222,663 cases of COVID-19, and California has 65,287 deaths resulting from COVID-19. Both of these numbers are currently rising due to the Delta variant of the COVID virus, which is more transmissible and is leading to breakthrough cases amongst the vaccinated, taxing the already overburdened California hospital system. Delta is now responsible for more than 83% of COVID-19 cases being reported in the U.S. and, with only 48% of the total U.S. population fully vaccinated, conditions are leaning towards the continued evolution and spread of SARS-CoV-2.¹ As concerning, a number of people who have been fully vaccinated for COVID-19 are experiencing breakthrough cases of COVID-19 with the Delta variant, which also appears to be impacting children at a much higher rate.² The American Academy of Pediatrics has released information showing that cases amongst children have risen from about 38,000 cases a week near the end of July, with the week ending August 19 seeing more than 180,000 cases in children.³

According to the most recent data available as of August 31, 2021, there are 8,766 people hospitalized in California with COVID-19. This is an increase of 87 from August 30, 2021. There are currently a total of 2,172 patients in ICU beds with COVID-19, and there are 1,696 ICU beds available throughout the state, a decrease of 44 beds from August 30, 2021.⁴ Cumulatively, among 5.1 million L.A. County residents who are fully vaccinated, 0.53% have tested positive, 0.014% have been hospitalized and 0.0013% — or 68 people — have died.⁵ The hospitalization rate among unvaccinated adults 50 and older has risen

¹ <https://asm.org/Articles/2021/July/How-Dangerous-is-the-Delta-Variant-B-1-617-2>.

² https://gis.cdc.gov/grasp/covidnet/COVID19_5.html.

³ <https://www.cnn.com/2021/08/25/health/us-coronavirus-wednesday/index.html>.

⁴ <https://covid19.ca.gov/state-dashboard/#todays-update>. Data obtained on August 23, 2021.

⁵ <https://www.latimes.com/california/story/2021-08-23/la-me-young-adults-hit-by-covid-19-breakthrough-infections>.

to a new summertime high: For every 100,000 unvaccinated older adults, nearly 60 were

This increase has led to a large numbers of California hospitals having a strain on their ability to provide adequate medical care to patients in their region. The current distribution of COVID-19 hospitalizations is focused on some regions and hospitals, such as LA County, and the burden of care needs to be moved among statewide healthcare resources. If this increase of COVID-19 patients continues due to variants of the virus, hospitals may be unable to provide necessary emergency and critical care to Californians.

The proposed regulation is necessary to ensure appropriate transfer of patients between healthcare facilities to address the continued surge of COVID-19 cases due to variants and low vaccination rates and to take appropriate responsive measures to ensure medically necessary services are available to enrollees throughout California. The proposed regulation is identical to the emergency regulation adopted by the Department on January 15, 2021.

Specific Problems Addressed and Necessity of Regulations

Subdivision (a) is added to clarify the applicability of the regulation by specifying it pertains to full-service health plans offering group or individual coverage, including grandfathered health plans. This provision is necessary to ensure health plans understand the scope of the proposed regulation to ensure compliance. In subdivision (a), the Department carved out Medi-Cal managed care plans from this regulation because the Department of Health Care Services has been working with the Centers for Medicaid and Medicare Services (CMS) to follow their laws, rules and guidelines concerning COVID-19. Therefore, the Department determined it was not appropriate to include this group of enrollment because of the potential for conflict between the Department's rule and CMS laws, rules and guidelines.

Subdivision (b) is necessary to define key terms in the proposed regulation. It is necessary to ensure clarity and consistent application of the proposed regulation, and to ensure health plans understand the scope of the proposed regulation to ensure compliance.

Subdivision (b)(1) is necessary to define covered public health order to ensure health plans clearly understand the scope of the emergency regulation and the applicable situation in which it pertains to their procedures and practices. Subdivision (b)(1) clarifies that the public health order is a state public health order and is specific to a state public health order issued related to COVID-19 and the current pandemic in California.

Subdivision (b)(2) is necessary to define transferring facility, which is a key term used throughout the emergency regulation and ensures that health plans understand when enrollees shall be moved from a transferring facility to ensure they receive appropriate medically necessary care.

⁶ *Ibid.*

Subdivision (b)(3) is necessary to define receiving facility, which is a key term used throughout the emergency regulation and ensures that health plans understand when enrollees shall be moved to a receiving facility to ensure they are able to obtain coverage for appropriate medically necessary care.

Subdivision (c) specifies what must occur when a health plan transfers an enrollee to the receiving facility. The Department requires a health plan to reimburse the receiving facility for 72 hours for all medically necessary services provided to an enrollee who was sent from a transferring facility. This amount of time was chosen because it gives the receiving hospital sufficient time to admit the enrollee, conduct intake, perform any necessary testing and stabilize the enrollee's condition. This provision is necessary to ensure the health plan understands what must occur to comply with the regulation in situations where an enrollee is transferred from one facility to another facility.

Subdivision (c)(1) is necessary to instruct health plans regarding the transfer of an enrollee to a facility and what is prohibited under the regulation. This provision makes specific that the health plan may not delay based on prior authorization, prior notice, or any other requirements that delay or prevent the transfer of the enrollee.

Subdivision (c)(2) makes specific that the health plan is responsible for the coverage of medically necessary costs of moving the enrollee between the transferring facility and the receiving facility to ensure the facilities receive reimbursement for these medically necessary services provided to health plan enrollees.

Subdivision (c)(3) is necessary to instruct the health plans that they are responsible for reimbursement of medically necessary services rendered by the receiving facility within the first 72 hours of the enrollee's transfer. This provision is necessary to ensure that the enrollee receives these services and the facility is properly reimbursed to providing the services.

Subdivision (c)(4) clarifies the circumstances in which the health plan shall reimburse a receiving facility for medically necessary services provided to an enrollee during the first 72 hours after the enrollee is transferred. This ensures that the receiving facility is properly reimbursed for medically necessary services provided to the enrollee.

Subdivision (c)(4)(A) makes specific that the receiving facility shall notify the health plan of the transfer of the enrollee. This provision clarifies what must occur to ensure the health plan is aware that an enrollee has been transferred and is receiving medically necessary services at a receiving facility.

Subdivision (c)(4)(B) makes specific that the health plan shall continue reimbursement to the receiving facility after the first 72 hours if the health plan does not disapprove the services being provided at the receiving facility. The subdivision clarifies that if the health plan disapproves the services being provided at a receiving facility, the health plan shall reimburse the receiving facility until such point as the health plan effectuates the transfer of the enrollee to a different facility or the enrollee is discharged. This will prevent any

confusion by the health plan regarding the appropriate rate in which to reimburse the receiving facility and ensures the receiving facility is properly reimbursed for providing medically necessary services.

Subdivision (c)(5) is necessary to clarify the payment amount by the health plan for medically necessary services provided by the receiving facility if the receiving facility has a contract with the health plan. This will prevent any confusion by the health plan regarding the appropriate rate in which to reimburse the receiving facility and ensure the receiving facility is properly reimbursed for providing medically necessary services to health plan enrollees.

Subdivision (c)(6) specifies the required payment amount by the health plan for medically necessary services provided by the receiving facility if the receiving facility does not have a contract with the health plan, which is the reasonable and customary rate. This will prevent any confusion by the health plan regarding the appropriate rate in which to reimburse the receiving facility and ensure the receiving facility is properly reimbursed for providing medically necessary services to health plan enrollees.

Subdivision (c)(7) specifies that the reasonable and customary rate shall be the rate required under title 28, section 1300.71(a)(3)(B). This will prevent any confusion by the health plan regarding the appropriate rate in which to reimburse the receiving facility and ensure the receiving facility is properly reimbursed for providing medically necessary services to health plan enrollees.

Subdivision (d) specifies an enrollee shall be liable for no more than the in-network cost the enrollee would have been responsible for had the enrollee not been moved to a receiving facility. This provision is necessary to ensure the enrollee is not financially harmed from being moved from a transferring facility to a receiving facility.

III. DOCUMENTS RELIED UPON

- Executive Department, State of California, Proclamation of a State of Emergency, published March 4, 2020.
- Executive Department, State of California, Executive Order N-33-20, dated March 19, 2020.CDC FAQs, available at www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread.
- Executive Department, State of California, Executive Order N-33-20, dated March 19, 2020.CDC FAQs, available at www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread.

IV. REASONABLE ALTERNATIVES TO THE REGULATION

The Department has determined that, due to the need for this regulation to clarify the requirements for health plans coordination of the transfer of patients between hospitals there are no reasonable alternative to implementing and adopting Rule 1300.67.02. The Department has not identified any reasonable alternative that would be more effective in carrying out the purpose for which the above action is proposed, or would be as

effective and less burdensome to affected private persons, than the proposed action.

The Department invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations and amendments at the above-mentioned hearing or during the written comment period. As part of this process, the Department must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

V. ECONOMIC IMPACT

The Department has determined that the regulation amendments will not have a statewide adverse economic impact directly affecting businesses because the proposed regulation implements and clarifies current state law. This regulation clarifies the obligations of health plans to coordinate the ready transfer of patients between hospitals due to overcrowding.

ECONOMIC IMPACT ANALYSIS (Government Code § 11346.3(b))

A. Creation or Elimination of Jobs Within the State of California

The proposed regulation is identical to the recently enacted emergency regulations amending title 28 of the California Code of Regulations regarding the transfer of enrollees pursuant to a public health order. This regulation details the requirements of health plans related to the transfer of enrollees between facilities pursuant to a public health order and is consistent with existing requirements of the Knox-Keene Act. Further, the requirements within the regulation are necessary to provide clear guidance to health plans regarding the health plan's obligation under the Knox-Keene Act to be able to readily transfer patients between facilities as is necessary to ensure access to medically necessary services. This regulation will benefit California by ensuring that enrollees receive the care they need when hospitalized during the pandemic as already required by the Knox-Keene Act. This regulation does not impose any requirements that do not already exist under state law. This regulation does not impose any requirements that do not already exist under state law and is providing clarification of existing health plan obligations. Given the nature of the proposed regulation already adopted as an emergency, the regulation will not create or eliminate jobs within the State of California.

B. Creation of New Businesses or the Elimination of Existing Businesses Within the State of California

This proposed regulation will neither create new businesses nor eliminate existing businesses. This regulation details the requirements of health plans related to the transfer of enrollees between facilities pursuant to a public health order and is consistent with existing requirements of the Knox-Keene Act. Further, the requirements within the

regulation are necessary to provide clear guidance to health plans regarding the health plan's obligation under the Knox-Keene Act to be able to readily transfer patients between facilities as is necessary to ensure access to medically necessary services. This regulation will benefit California by ensuring that enrollees receive the care they need when hospitalized during the pandemic as already required by the Knox-Keene Act. This regulation does not impose any requirements that do not already exist under state law. This regulation does not impose any requirements that do not already exist under state law and is providing clarification of existing health plan obligations. This regulation will benefit California by ensuring that enrollees receive the care they need when hospitalized during the pandemic; thereby, creating more stability for businesses operating in California who will be bolstered by a stabilized health care delivery system. This regulation does not impose any requirements that do not already exist under state law. Therefore, the regulation creates no additional requirements that would affect the creation of new or elimination of existing businesses in California.

C. Expansion of Businesses Currently Doing Business Within the State of California

This regulation is intended to clarify existing state law for health plans under the Knox-Keene Act. Further, the requirements within the regulation are necessary to provide clear guidance to health plans of their obligations under state law related to the transfer of enrollees between facilities during a public health emergency. This regulation does not create any new requirements and only updates the existing law and provides further clarification. Therefore, the Department determined this regulation will not significantly affect the expansion of businesses currently doing business within the State of California.

D. Benefits of the Regulation to the Health and Welfare of California residents, worker safety, and the State's Environment

The proposed regulatory action will provide health plans with their obligations to enrollees during the pandemic consistent with state law and benefits the health and welfare of California residents during the pandemic. This regulation details the requirements of health plans licensed by the Department for the transfer of enrollees between facilities pursuant to a public health order as already required by the Knox-Keene Act. The Department does not anticipate this regulatory action will have any impact on worker safety, or the state's environment.